LABOR LAW ROUNDTABLE

An Informative Q&A with OC's Top Labor Law Professionals

Heather Dillion
Partner
Dorsey & Whitney LLP

Maria Stearns
Employment Chair and Partner
Rutan & Tucker LLP

Brandon Sylvia
Partner
Rutan & Tucker LLP

Jeffrey R. Thurrell
Regional Managing Partner, Irvine
Fisher & Phillips LLP

Nisha Verma
Partner
Dorsey & Whitney LLP

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ROUNDTABLE PARTICIPANTS

Heather Dillion, Partner, Dorsey & Whitney LLP
Heather Dillion's practice focuses on representing businesses of all sizes in all aspects of workplace law matters, including pre-litigation claims and litigation, as well as preventive advice and counseling. Whether defending claims involving employment discrimination, harassment, wrongful termination, and retaliation, or wage and hour violations and compliance, Dillion works to understand the client's goals to minimize risk, limit financial impact and achieve the best outcome possible. In addition to advising clients on preventive litigation practices, her clients rely on her guidance about day-to-day employment issues, including how to comply with applicable laws and regulations, avoid workplace disputes, and resolve employee relations problems. As well as building compliant handbooks and policies.

Maria Stearns, Employment Chair and Partner, Rutan & Tucker LLP
Maria Stearns represents local and national employers doing business in California. As part of her employment litigation practice, Ms. Stearns defends employers in cases involving: discrimination, retaliation and harassment claims; wage and hour class actions; and representative claims under California's Private Attorneys General Act. Ms. Stearns also serves as a day-to-day resource for employers seeking guidance on issues that commonly arise as part of the employment relationship: WARN Act compliance; sexual harassment training; employee handbook and personnel policies; medical leave and disability accommodation obligations; commission and bonus agreements; and wage and hour compliance. Ms. Stearns has particular expertise in the healthcare, restaurant and retail industries. She has been selected by the Daily Journal as Top Labor & Employment Lawyers in California (2016, 2020-2022) and Top 100 Women Lawyers in California (2014-2020).

Brandon Sylvia, Partner, Rutan & Tucker LLP
Brandon Sylvia's practice involves representing and counseling employers in all areas of employment law, including harassment, workplace discrimination, terminations, employment agreements, leaves of absence, wage and hour issues, trade secrets, unfair competition, accommodating disabilities, and employment policies and procedures. Mr. Sylvia has represented employers in numerous forums in the state, including state superior courts; federal district courts; appellate proceeding before the California Court of Appeal, the California Supreme Court, and the Ninth Circuit Court of Appeals; and before various state and federal administrative agencies. Mr. Sylvia is sought after by employers needing practical and creative advice to minimize risk, and by companies seeking strategic, efficient, and tenacious representation in employment litigation.

Jeff Thurrell, Regional Managing Partner, Irvine, Fisher & Phillips LLP
Jeff Thurrell is a regional managing partner in the firm's Irvine office. His practice is focused on defending employment related lawsuits and administrative complaints on a variety of issues, including harassment, retaliation, and discrimination. He represents employers in both state and federal courts as well as before state and federal agencies, such as the Equal Employment Opportunity Commission (EEOC), the California Department of Fair Employment and Housing (DFEH), and the Division of Labor Standards Enforcement (DLSE). Thurrell regularly represents employers in unlawful harassment and discrimination matters and also has extensive experience handling complex, multi-plaintiff wage & hour matters. He also spends a significant portion of his time counseling employers on internal harassment and discrimination investigations, pay practices and workplace violence situations. He is a frequent lecturer before trade groups, associations and private employers and regularly conducts in-house management seminars and training sessions for executives, supervisors, managers, and human resources professionals in all aspects of labor and employment law.

Nisha Verma, Partner, Dorsey & Whitney LLP
Nisha Verma is passionate about helping organizations avoid or minimize the distraction of litigation, so that they can focus on their core mission. She is always looking for the most innovative and efficient ways to provide solutions in response to her clients' labor and employment needs. Verma has delivered results for her clients with respect to all aspects of labor and employment law, and has a depth of experience in the most challenging issues employers face today, including sexual harassment or other sensitive investigations, employment terminations and severance negotiations, and confidentiality, non-disparagement, and trade secret protections. Verma has also handled all aspects of union relations for employers. She is a seasoned litigator and handles a wide variety of litigation including single-plaintiff actions, contractual disputes, and wage and hour class actions and representative actions.

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Maria Stearns
Employment Partner & Chair

Brandon Sylvia
Employment Partner

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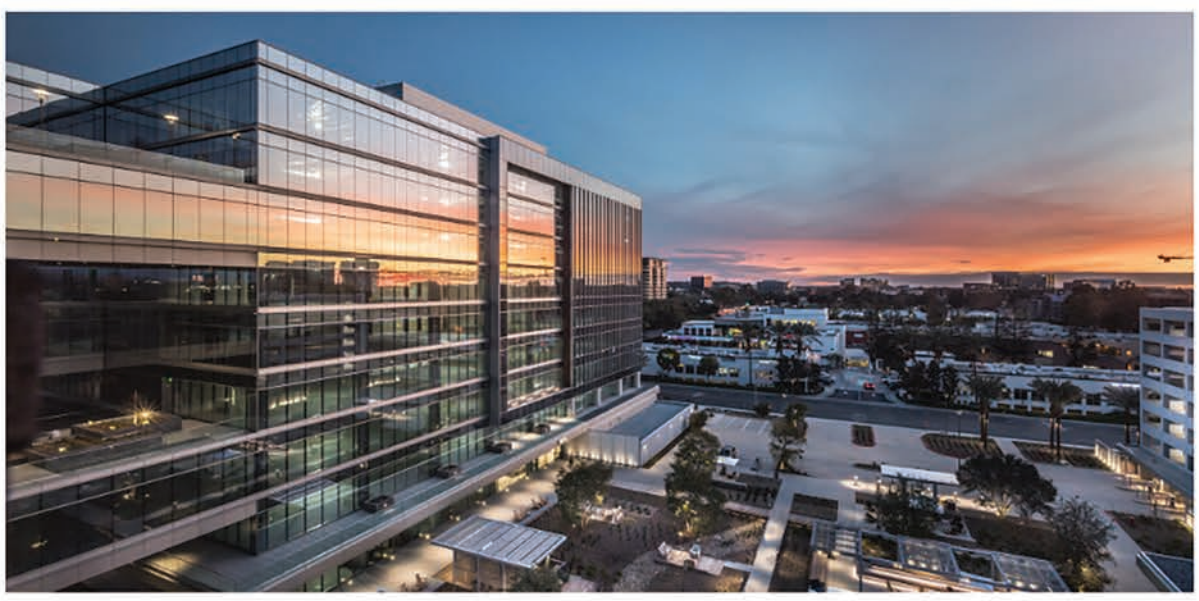

LABOR LAW ROUNDTABLE

The enforceability of pre-dispute arbitration agreements between employees and employers in California has been a source of significant litigation over the last 30 years.

Jeffrey R. Thurrell
Regional Managing Partner, Irvine
Fisher & Phillips LLP

What changes should employers make to confidentiality and non-disparagement agreements in light of recent guidance from the National Labor Relations Board?

Nisha Verma: Recently, the NLRB invalidated a severance agreement prohibiting employees from making statements that could disparage or harm the employer's image and disclosing the terms of the agreement, finding that such provisions curtailed protected organizing activity. The General Counsel of the NLRB subsequently issued a memorandum – which does not have the effect of law – opining that narrowly-tailored confidentiality clauses and provisions targeting defamation may be considered lawful. While the issue has not yet been litigated, severance provisions that comply with California law, which already limits confidentiality and non-disparagement provisions, may have the potential to pass muster under the NLRB's standard. Employers should work with counsel to review whether their separation agreements already meet the NLRB's new standard, or can be easily tailored to do so.

With improvements to predictive AI playing a more significant role in employee hiring will there be legal pitfalls for employers who elect to utilize this new technology.

Jeffrey R. Thurrell: There is no doubt that AI is going to have an even more impactful role in most aspects of life. Employers are already using AI from algorithms that filter out job applicants and assist in employment decisions such as promotions and pay increases. In October of 2022, the Biden administration unveiled a "Blueprint for an AI Bill of Rights" that in part focuses on making sure the algorithms used are equitable and free from discrimination. California lawmakers now are working through a bill in the legislature that will provide safeguards to ensure that AI would not have a discriminatory impact and would open businesses up to significant compliance scrutiny. AI that is proven to have a discriminatory impact could open businesses up to liability.

What are the biggest wage and hour mistakes you continue to see California employers make that cost big bucks?

Heather Dillion: Two of the most common mistakes I continue to see is (1) the misclassification of an employee and (2) the failure to comply with the California meal and rest break law. Employers must satisfy all the requirements of a stringent test in order to label a worker as an independent contractor, which includes the question of whether the worker performs work outside the hiring entity's usual course of business and whether the employee is customarily engaged in an independently established trade, occupation, or business. Employers must also conduct an analysis to determine that their exempt employees do properly fall into an exemption. Separately, it is critical that employers have strong break policies and practices in place, including the triggering of a penalty payment as necessary.

Jeffrey R. Thurrell: I tell employers regularly that it is nearly impossible to comply with all of the complexities that are woven into the state and local wage and hour laws. Minor and technical violations in the aggregate often end up being the centerpiece of class action litigation that spells 7-figure liability. Time and again I see that employers do not have compliant meal and rest period policies. Oftentimes employers do not correctly determine the regular rate of pay for overtime and premium pay purposes because the employers fail to include non-discretionary bonuses into the regular rate. Finally, employers consistently do not have compliant paystubs that contain the 9 items required under the California Labor Code.

Maria Stearns: Late Meal Periods & Inaccurate Paystubs. Meal Periods: Although it has been over a decade since the California Supreme Court provided guidance on the timing of meal periods in *Brinker*, we routinely see employers providing meal periods after 5.00 hours of work, which is a late meal period entitling the employee to an extra hour of pay at their regular rate as a meal period penalty. If an employee works a shift that is greater than 5.00 hours, the employee must be provided a 30-minute duty free meal period **before** the employee works more than 5.00 hours (if the shift is no greater than 6.00 hours, the meal period can be waived). Paystubs: California Labor Code section 226 sets forth specific requirements regarding the information that must be included on a paystub. Employers wrongly assume that their payroll provider is issuing California-compliant paystubs, a mistake that can result in a penalty of up to $4,000 per employee. Review your paystubs!

What are the pros/cons of utilizing mandatory arbitration agreements in California?

Jeffrey R. Thurrell: The enforceability of pre-dispute arbitration agreements between employees and employers in California has been a source of significant litigation over the last 30 years. The most significant benefit of a pre-dispute arbitration agreement for an employer is that if it is adequately drafted it should insulate an employer from any class action litigation which could save an employer millions of dollars. There are a few other benefits in that the arbitration process is typically more streamlined and efficient. With that said, there are definitely some drawbacks for employers. Namely, employers have to pay all of the arbitrator fees and there are very limited rights to appeal an arbitrator's decision.

Heather Dillion: A mandatory arbitration agreement is advantageous for a number of reasons. An agreement with a proper class action and representative action waiver greatly mitigates the risk of class/representative actions for an employer in California. Moreover, arbitration allows disputes to be resolved in a less procedurally complex manner, by a neutral arbitrator (and not by an unpredictable and at times employer-adverse jury), and more confidential manner than traditional litigation (an exception to this are claims of sexual harassment). Disadvantages also exist such as the cost to the employer, the possibility of a subjective arbitrator, the inability to appeal the result, and the lack of overall transparency.

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Jeffrey R. Thurrell

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Employers should not assume that an employee's disability will prevent the employee from performing the essential functions of the job.

Maria Stearns
Employment Chair and Partner
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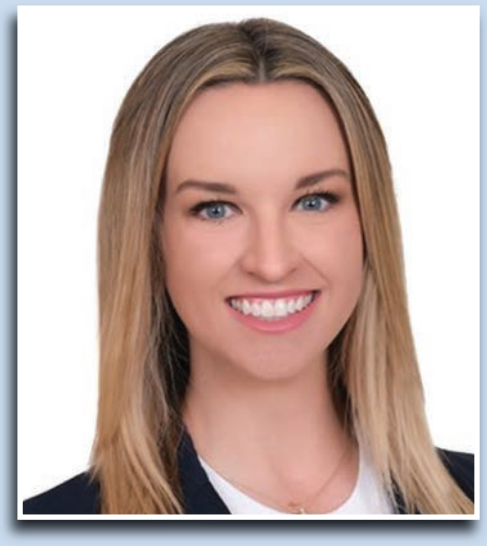

California has a long-standing policy favoring employee mobility and generally holds non-compete agreements unenforceable.

Heather Dillion
Partner
Dorsey & Whitney LLP

Brandon Sylvia: Perhaps the primary benefit of a properly-written arbitration agreement is that it serves as a powerful tool to sidestep a wage-and-hour class action lawsuit. Whether arbitration agreements will also permit employers to completely short-circuit a representative claim under the Private Attorneys General Act of 2004 ("PAGA") is presently unclear, although guidance from the California Supreme Court is expected in the coming months. Both class and PAGA actions represent bet-the-business size exposure; thus, avoiding these lawsuits is a motivating reason many employers utilize these agreements. Arbitration is also viewed as a way to avoid the "runaway jury" risk of a large, public verdict in cases with egregious facts. Downsides of arbitration include cost: the employer must pay the arbitrator's fees, which can be significant. Dispositive motions are also disfavored in arbitration; and, evidentiary standards are more relaxed, which may be good or bad depending on the specifics of the dispute. Despite the cons, we typically advise employers to utilize arbitration agreements, given the scourge of wage-and-hour litigation in California.

What are the most common mistakes you see employers make in responding to disability accommodation requests?

Maria Stearns: Don't make assumptions, jump to conclusions or be close-minded! Employers should not assume that an employee's disability will prevent the employee from performing the essential functions of the job. Even if it seems unlikely that there is a reasonable accommodation the employer can provide to enable the employee to perform the essential functions of the job, the employer is legally required to engage in a good faith interactive process with the employee to understand the nature of the work limitations and explore possible reasonable accommodations. An accommodation is "reasonable" as long as it is not "unduly burdensome." Just because an accommodation may be inconvenient or have a cost associated with it, doesn't necessarily mean that it isn't a reasonable accommodation. The outcome of the interactive process meeting should be confirmed in a written communication to the employee (e.g., an email or memo that the employee signs), not simply an internal note to the file.

What are the restrictions on pre-employment confidentiality agreements in California?

Nisha Verma: Since 2019, in the wake of the #MeToo movement, California lawmakers have passed restrictions on nondisclosure provisions in settlement agreements which, at the time appeared to be a seismic shift in employer-employee relations, but have since become commonplace. This trend has expanded to include pre-dispute agreements with the "Silenced No More Act," which became effective January 1, 2022. Specifically, employers cannot require employees to sign agreements that have "the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace," and any agreement that limits an employee's ability to disclose information related to conditions in the workplace must include a disclaimer. Note, however, that the mere use of the disclaimer is unlikely to cure an overbroad nondisclosure agreement.

Describe the unique challenges employers are facing in managing a post-COVID workforce and success strategies.

Brandon Sylvia: One of the many effects of the pandemic was to shift the power dynamic between employers and employees. Post-COVID, it seems that workers have greater mobility and more bargaining power than before. This typically manifests in salary requirements, flexible schedule requests, or demands for at least partial remote work. Especially when combined with California's pay transparency, pay equity, and job posting laws, hiring employees has become a more difficult process, and one fraught with potential exposure. Employers must also be prepared to deal with current employees who may attempt to use reasonable accommodation obligations imposed by the Fair Employment & Housing Act to justify requests to work remotely. With so much of the workforce having worked from home for months or years during the pandemic, employers will find it more difficult to automatically refuse the remote work request based simply on "undue hardship," and will need to carefully navigate the interactive process to avoid creating liability.

When can a non-compete be enforced in California?

Heather Dillion: California has a long-standing policy favoring employee mobility and generally holds non-compete agreements unenforceable. There are limited circumstances in which such an agreement is enforceable under the state's Business and Professions Code, as well as Labor Code Section 925 (discussed in a separate answer). B&PC 16601 allows a buyer of a business to restrict the seller's ability to engage in a similar business following the transaction where the seller transitions its goodwill and its full ownership (which must be "substantial") in the business. The best way to protect your business in this regard in California is by utilizing strong confidentiality agreements and trade secret protections.

What are the most common mistakes you see employers make in responding to an employee's internal complaint of harassment or discrimination?

Jeffrey R. Thurrell: It is very easy to Monday morning quarterback how an employer responded to a complaint of unlawful harassment or discrimination. Devastating financial consequences can result if a jury or arbitrator concludes that the business took short cuts during an investigation or jumped to conclusions. The mistakes in investigations that I consistently see are a failure to gather all of the relevant evidence and interview all of the relevant parties. Additionally, employees inexplicably fail to investigate all of the allegations. Oftentimes, critical credibility assessments are not made by the investigator. Finally, there are many times where the employer does not close the loop with

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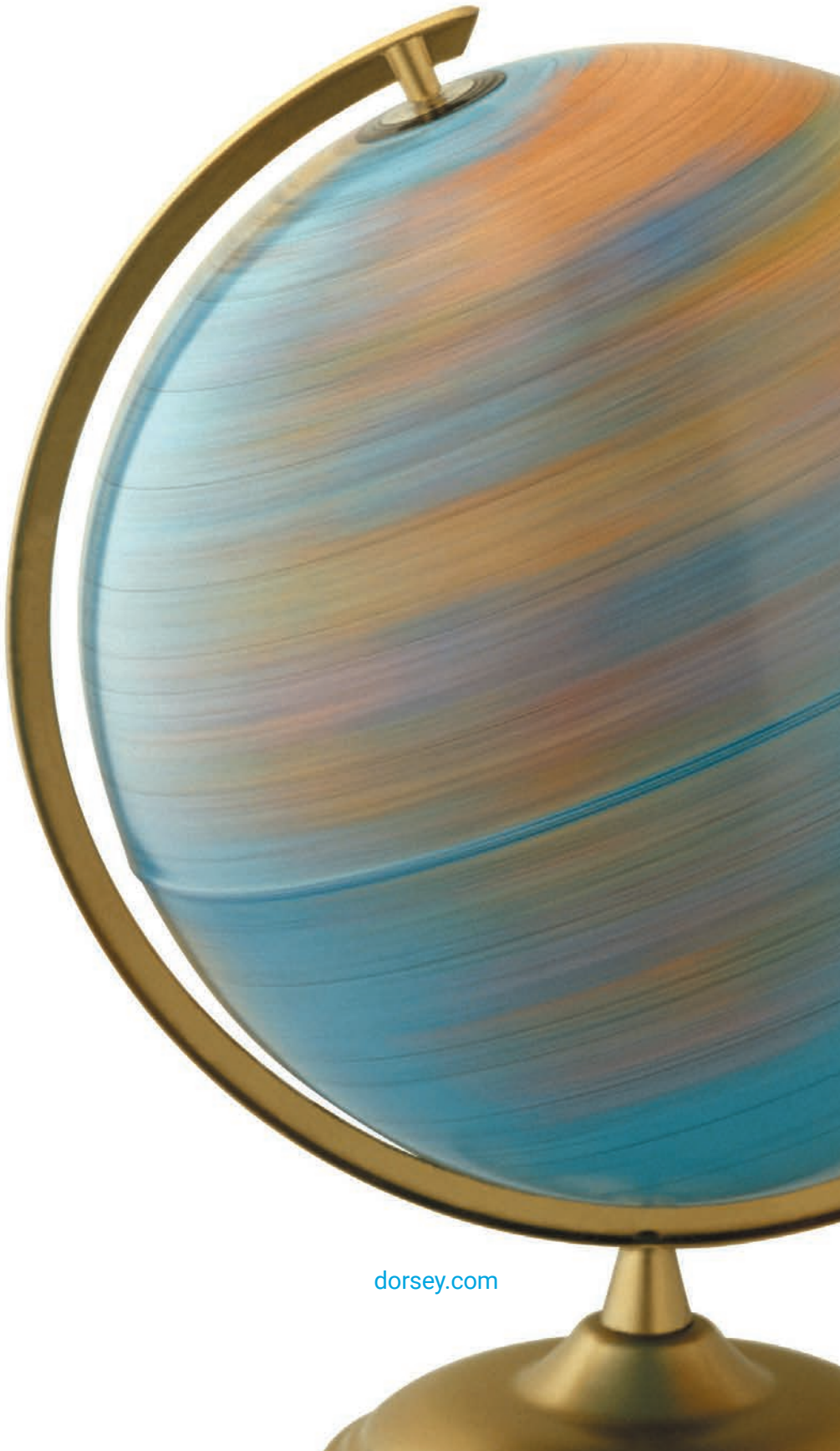

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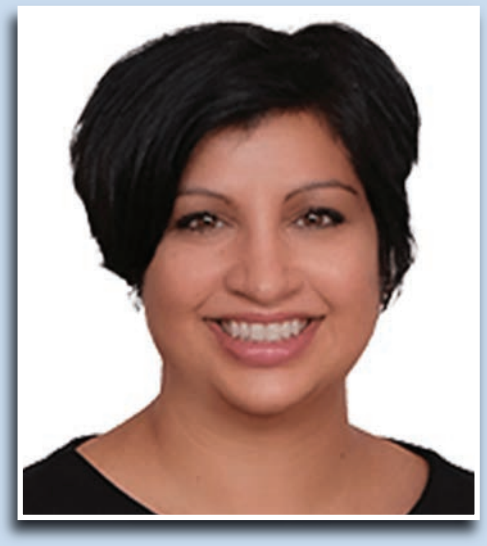
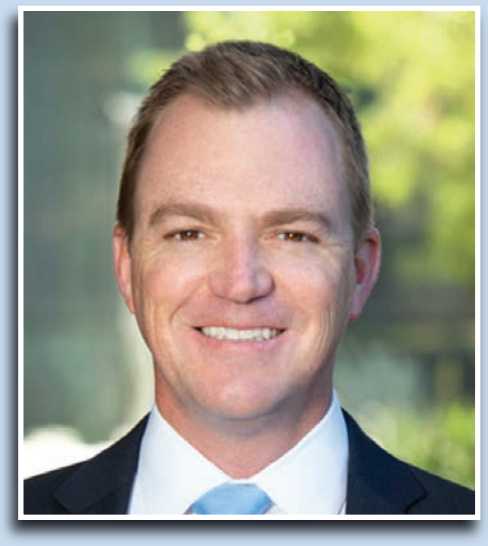


Employers can support their employees' ability to meet with their union representatives, but are not required to grant non-employee union representatives access to their property in order to do so.

Nisha Verma
Partner
Dorsey & Whitney LLP



Ignoring an employee complaint, or not taking it seriously, can create significant legal exposure.

Brandon Sylvia
Partner
Rutan & Tucker LLP

the alleged victim to confirm the findings of the investigation.

Brandon Sylvia: Sometimes, employers are reluctant to treat complaints seriously. It may be that the complaint is about a petty dispute, or arises from a run-of-the-mill personality conflict rather than legally protected activity. Or, it may be that the complaint was brought forward by an employee perceived to be a frequent complainer, or someone with performance problems who is looking to deflect attention away from their own failures. In these situations, it is crucial for employers to not be dismissive of the complaint, and to conduct a prompt and thorough investigation. Ignoring an employee complaint, or not taking it seriously, can create significant legal exposure. A second common mistake is that employers sometimes neglect to "close the loop" by communicating to the complainant that an investigation was conducted, the findings made, and the actions taken. This can result in the complainant wrongly believing that their internal complaint was ignored by the employer and that they need to seek relief externally by contacting an attorney or filing a complaint with the California Civil Rights Department.

What are employer's rights relating to non-employee union representatives on their premises?

Nisha Verma: Employers can support their employees' ability to meet with their union representatives, but are not required to grant non-employee union representatives access to their property in order to do so. A recent National Labor Relations Board decision overruled longstanding precedent that allowed non-employee union representatives to enter public spaces on the employer's private property. Now, an employer can lawfully refuse such access to non-employee union representatives, regardless of whether the space they seek to access on the property is open to the public. However, exceptions exist. Specifically, employers may not prohibit such access when (1) there is no other way for representatives to communicate with employees, or (2) the employer discriminates by allowing similar conduct by others on the property.

Can another state's choice of law provision be used to enforce a non-compete in California?

Heather Dillion: In light of its robust public policy in favor of open competition, Employers are unlikely to convince a California court to enforce a non-compete agreement by virtue of a choice-of-law provision. However, under Labor Code Section 925, where an attorney represents the employee when entering into an employment agreement, the agreement's choice of law provision may be applied. Currently, Assembly Bill 747 looks to make substantial changes to Section 925, including that the employer cannot pay for, or even recommend, the attorney representing the employee.

What should an employer do if it is notified of a petition for the election of a union in their workforce?

Nisha Verma: Employers that receive a petition for election must understand that an immediate response is required. Once the petition is filed, an employer must, in short order: (1) post a notice in conspicuous areas around the workplace and (2) appear for a hearing where any objections with respect to the election will be heard. Employers should also organize a training for managers to help them better understand their role in the process and how their words and actions may be subject to challenge. The specific rules governing elections can be counter-intuitive and are rapidly evolving. That said, employers are entitled to take a stance in regard to the efforts at unionization, but may want to consider what kind of campaign their employees would be receptive to.

Is rounding time (punch in and out) legal in California?

Heather Dillion: It depends. Until recently, California courts resolved this issue according to a 2012 decision in which the ability of an employer to utilize a time rounding policy was found to be lawful. The court required the policy to (1) be fair and neutral on its face and (2) not be used in a manner that, over time, results in the failure to compensate the employees properly for their time worked. However, a more recent decision by another court in held that if an employer's timekeeping system can determine the exact amount of time an employee works, then the employee must be fully compensated for that time. It appears that in most situations, the ability to lawfully round time in California may be ending.

Can employers still test for marijuana in California?

Jeffrey R. Thurrell: According to many studies, employees who tested positive for marijuana have nearly 85% more injuries and 75% greater absenteeism. A workforce of marijuana users potentially leads to decreased productivity, higher turnover and more workers' compensation claims. When Governor Brown legalized recreational marijuana in California back in 2016 he made it clear that employers could still have a workforce of employees who were marijuana free. As of January 1, 2024, employers will no longer be able to test for the mere presence of marijuana in an employee's system. Further, employers can only take an adverse employment action (e.g. refusal to hire or a termination) if the employee is actually "impaired" by marijuana while working. The science is still lagging in terms of having such a test to determine impairment by marijuana.

Nisha Verma: Yes, employers can test for marijuana. However, California's AB 2188 significantly limits the actions an employer may take should an employee's test come back positive for non-psychoactive cannabis metabolites. Traditional tests rely on the presence of such metabolites and are ineffective at determining present impairment. They only test for cannabis that was recently metabolized, meaning cannabis consumed a week prior can cause a positive test. Beginning 2024, employers may only take action based upon (1) a positive test showing active tetrahydrocannabinol or (2) an employee's failure to pass an impairment test measuring their cognitive and psychomotor capabilities against their own baseline performance. Note that the new law does exempt employees in the construction industry and positions requiring drug testing pursuant to federal law or contract.